Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1980

No. 79-1243

WARDEN, Greenhaven Correctional Facility, SUPERINTENDENT, Auburn Correctional Facility, SUPERINTENDENT, Greenhaven Correctional Facility,

Petitioners,

against

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Warden of Greenhaven Correctional Facility *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 26, 1979.

Opinion Below

The order of the Court of Appeals affirming, without opinion, the judgment of the District Court for the Southern District of New York appears in the Appendix hereto. The opinion of the District Court, not yet reported, also appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 26, 1979. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether three defendants who have jointly retained one attorney to represent them in a criminal trial can consent to such joint representation in response to an inquiry by the trial judge, thereby waiving their right to subsequently challenge the joint representation as ineffective under the Sixth and Fourteenth Amendments to the United States Constitution.

Constitutional Provisions Involved

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Respondents were indicted by the Grand Jury of Bronx County in February, 1972, for, *inter alia,* acting in concert to commit intentional murder. Respondents jointly retained an attorney, Stanley Siegel, Esq., and in January, 1974, the case was moved to trial. Prior to jury selection, an untranscribed discussion was had among the trial judge, the defense attorney and the prosecutor.

According to the sworn statements of the prosecutor and the trial judge which were submitted to the District Court in response to respondents' petitions for federal writs of habeas corpus, the judge asked defense counsel whether he had discerned a potential conflict of interest amongst his clients. Mr. Siegel assured the court that no

conflict had arisen, or would likely arise during the trial. The trial judge nevertheless directed defense counsel to advise his clients of the court's concern that a conflict of interest might arise during the trial and ask his clients if they wanted the opportunity to retain separate counsel or request that separate counsel be appointed for them.

In a second affidavit submitted to the District Court, the trial judge asserted that he subsequently took the bench and asked defense counsel, in the presence of respondents, whether he had complied with the court's directive. After counsel replied that he had advised his clients of the court's concern, all three respondents were separately questioned by the trial judge, and they informed the court of their desire to proceed to trial with joint counsel (A. 10-11, 26-27).*

During the trial, eight witnesses testified for the prosecution, and six eyewitnesses described the beating which respondents inflicted upon 16-year-old William Travieso. All three respondents were observed carrying knives, and punching and kicking their victim, whose death was caused by a stab wound to his chest. Respondent Bonilla, the sole witness for the defense, testified that the decedent started the fight and that neither he nor his two cohorts used knives during the melee. Respondents were convicted of intentional murder and criminal possession of a weapon after their jury trial in state court (T. 27-43, 97-102, 143-47, 162-63, 210-11, 232-33, 250-51, 298-304).

* Numbers prefaced by the letter "A." refer to the Joint Appendix submitted by petitioners to the Second Circuit Court of Appeals; those prefaced "T." refer to the transcript of the state trial conducted in New York State Supreme Court, Bronx County, from January 24 to February 5, 1974.

The judgments of conviction of respondents Laureano and Bermudez were affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York, First Department, on December 3, 1974. The judgment of respondent Bonilla's conviction was affirmed by that court on February 15, 1977. Leave to appeal the judgments of conviction of Laureano and Bermudez to the New York Court of Appeals was denied by former Chief Judge Charles Breitel on January 22, 1975, while Bonilla's application for leave to appeal to that Court was denied by Chief Judge Breitel on April 14, 1977.

Respondents thereafter petitioned for writs of habeas corpus in the Federal District Court for the Southern District of New York. In support of their petition, respondents submitted the affidavit of their trial attorney who asserted that, in an untranscribed conference, he requested the trial judge to appoint separate counsel before trial commenced and the judge refused his request. In separate affidavits submitted to the District Court, the trial judge and prosecutor controverted that allegation and provided the account of the inquiry described above.

Notwithstanding the existence of these disputed facts never before presented to the state courts, the District Court ruled that respondents had exhausted state remedies. The District Court granted respondents' petitions for writs of habeas corpus without ordering a hearing on the disputed facts. On November 26, 1979, this order was affirmed without opinion by the Court of Appeals for the Second Circuit.

Reasons for Granting the Writ

This Court should grant the instant petition to resolve several important questions which are constantly recurring in the area of joint representation, and to correct a Court of Appeals decision which is clearly erroneous. The proper role of the judge presiding over a criminal trial of two or more co-defendants who have retained joint counsel, has not been defined by this Court. *See, Holloway* v. *Arkansas,* 435 U.S. 475, 483-84 (1978). Yet, this Court has clearly stated that joint representation is not *per se* violative of the criminal defendant's right to effective representation of counsel. *Holloway, supra* at 482. Thus, assertion of the right to retain a particular attorney and have him jointly represent two or more defendants is constitutionally permissible. *Kaplan* v. *Bombard,* 573 F.2d 708, 714-15 (2d Cir. 1978).

In the instant case, the trial judge affirmed that he made an extensive inquiry of defense counsel concerning the potential for conflicting interests to arise amongst his clients during the trial and that each defendant personally indicated he wanted to continue to be jointly represented by this retained attorney. Further, the defense attorney assured the judge that he had advised his clients of the possibilities that conflicts of interest would arise at trial. By disregarding this evidence, and granting the petitions for writs of habeas corpus, the Court of Appeals and District Court have ruled, in effect, that respondents could not consent to joint representation prior to trial. This ruling conflicts with *Holloway* v. *Arkansas, supra,* with previous decisions of the Second Circuit Court of Appeals and with those

of other circuit courts. *Zuck* v. *State of Alabama,* 588 F.2d 436, 440 (5th Cir. 1979); *United States* v. *Waldman,* 579 F.2d 649, 652 (1st Cir. 1978); *Kaplan* v. *Bombard,* 573 F.2d 708, 714-15 (2d Cir. 1978); *United States* v. *Eaglin,* 571 F.2d 1069, 1086 (9th Cir. 1977); *United States* v. *Lawriw,* 568 F.2d 98, 104 (8th Cir. 1977); *United States* v. *LaRiche,* 549 F.2d 1088 (6th Cir. 1977), *cert. denied,* 430 U.S. 987 (1977). These cases establish that a defendant who consents to joint representation forever waives his right to argue that such representation was conflict-ridden and therefore ineffective.

Petitioners urge this Court to definitively rule on this matter of utmost importance to both federal and state judges who preside over criminal trials where multiple defendants have chosen to be represented by one retained attorney.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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January, 1980

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit

Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 26th day of November, one thousand nine hundred and seventy-nine.

Present:

Hon. WILLIAM H. MULLIGAN
Hon. THOMAS J. MESKILL
Hon. AMALYA L. KEARSE
Circuit Judges.

79-2121, 79-2122, 79-2123

UNITED STATES OF AMERICA *ex rel.* FERNANDO BERMUDEZ,
Petitioner-Appellee,

against

LEON J. VINCENT, Warden, Greenhaven Correctional Facility, Stormville, New York,
Respondent-Appellant.

JOSE LAUREANO,
Petitioner-Appellee,

against

SUPERINTENDENT, Auburn Correctional Facility and DEPARTMENT OF CORRECTIONAL SERVICES,
Respondents-Appellants.

JOSE BONILLA,
Petitioner-Appellee,

against

DAVID HARRIS, Superintendent of Greenhaven Correctional Facility,
Respondent-Appellant.

Order of the United States Court of Appeals for the Second Circuit

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion below of the Hon. Morris E. Lasker, 77 Civ. 2048, 78 Civ. 1023, 79 Civ. 1265 (S.D.N.Y. June 27, 1979).

/s/ William H. Mulligan

William H. Mulligan

/s/ Thomas J. Meskill

Thomas J. Meskill

/s/ Amalya L. Kearse

Amalya L. Kearse

APPENDIX B

Opinion of the United States District Court for the Southern District of New York

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2048 (MEL)

UNITED STATES OF AMERICA *ex rel.* FERNANDO BERMUDEZ,
Petitioner,

against

LEON J. VINCENT, Warden, Green Haven Correctional Facility, Stormville, New York,
Respondent.

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78 Civ. 1023 (MEL)

JOSE LAUREANO,
Petitioner,

against

SUPERINTENDENT, Auburn Correctional Facility and DEPARTMENT OF CORRECTIONAL SERVICES,
Respondents.

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79 Civ. 1265 (MEL)

JOSE BONILLA,
Petitioner,

against

DAVID HARRIS, Superintendent, Greenhaven Correctional Facility,
Respondent.

Opinion of the District Court

Appearances:

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LASKER, D.J.

On March 12, 1974, Fernando Bermudez, Jose Laureano and Jose Bonilla were convicted in state court of acting in concert to murder William Travieso. No single defendant was charged with having been the actual killer. Their convictions were affirmed without opinion by the Appellate Division, and leave to appeal to the Court of Appeals was denied. All three now petition for writs of habeas corpus on the ground that their joint representation at trial denied them their Sixth Amendment right to effective assistance of counsel.

Opinion of the District Court

The petitions of Fernando Bermudez and Jose Laureano were referred for recommendation to Magistrate Gershon. Since the issues raised in Bonilla's petition, filed subsequently, are identical to those raised in the other two, the Magistrate's Report will be deemed to apply to it as well.

In a 35 page opinion, the Magistrate recommends that the writs be granted. Because we adopt her findings and conclusion, we make no attempt to duplicate her exhaustive and well-reasoned analysis but deal here only with the objections to her Report made by the State.

Exhaustion of State Court Remedies

It is not disputed that the same claim raised here was presented to the state courts. However, additional facts have been introduced as part of the habeas proceedings which the State contends materially alter the petitioners' argument and require that the cases be sent back to the state courts to afford those courts a "fair opportunity" to review the case in its allegedly new posture.

In their state court appeals no claim was made—at least by Bermudez or Laureano—that defense counsel had actually raised the issue of conflict of interest with the trial court. Instead, petitioners' claim was based solely on the trial judge's failure to exercise his affirmative obligation to inquire into the possibility of a conflict. However, in connection with the habeas proceedings in this court, petitioners have introduced an affidavit from their trial counsel who states that, in an off-the-record discussion, he advised the trial judge that a conflict of interest existed between his

clients and requested that separate counsel be appointed. The affidavit further states that the judge dismissed counsel's request as a "stalling tactic". (Affidavit of Stanley Siegel, April 27, 1977, ¶6) The State also supplemented its papers before this court by an affidavit from the trial judge who denies that the conversation described by defense counsel took place and states that he instructed counsel, in an unrecorded conversation, to ask his clients whether they wished to obtain separate counsel but was advised by counsel that they did not. (Affidavit of the Honorable William Kapelman, May 25, 1977, ¶¶ 4-7) Somewhat surprisingly, following the issuance of the Magistrate's Report, the State filed an additional affidavit in which the trial judge states that his conversation with defense counsel on the question of conflict of interest took place in the presence of petitioners and that, when questioned directly by the judge, all three men agreed that they wished to proceed with joint counsel. (Affidavit of April 23, 1979, ¶ 5)

The Magistrate concluded that the additional information offered in support of the petitioners' position did not "critically affect" the claim presented to the state courts. Moreover, she found that it would be futile to remand the case to the state since the appeal of Jose Bonilla, filed after those of the other two, referred to the conversation attested to by defense counsel, and his conviction was nevertheless affirmed. However, the State relies on *Holloway* v. *Arkansas,* 435 U.S. 475 (1978), to argue that the new facts significantly alter petitioner's [*sic*] position. In *Holloway,* the Supreme Court indicated that the degree of prejudice necessary to be established on appeal would vary depending on

whether or not defense counsel had raised the issue of prejudice at trial, and held that, in a situation in which counsel repeatedly moved on the record for appointment of separate counsel, prejudice would be presumed.

Despite the State's contentions, we are not persuaded that there is a significant likelihood that the new evidence in the record would alter the disposition of the matter by the state courts. Defense counsel's representations are considerably undercut by the assertion of the trial judge also presented for the first time here that he himself rather than defense counsel raised the possibility of conflict with petitioners. Moreover, even if taken at full value, it is doubtful whether counsel's brief, off-the-record conversation brings this case within the ambit of *Holloway* in which defendants argued forcefully on at least three occasions that they should be granted separate counsel.[1] The concept of futility must be interpreted to encompass notions of economy and fairness. Thus unless new material creates at least a moderate likelihood of a different result, it is

1. Several other factors cast doubt on the likelihood that the state courts would reverse their position. One factor is the already heavy burden of proof met by the prosecution on appeal. Before the Appellate Division petitioners argued, and the State conceded, that the trial judge had not inquired into the possibility of conflict. This circumstance placed the burden on the prosecution of proving an absence of prejudice from joint representation, *United States* v. *DeBerry,* 487 F.2d 448, 453-54 n. 6 (2d Cir. 1973), a burden which the Appellate Division, which affirmed without opinion, apparently found was easily met. Thus the possibility of a different result is minimized by this prior conclusion that petitioners suffered no prejudice at trial. Finally, it is of some significance that Bonilla did refer in passing in his appellate proceedings to the conversation described by his trial lawyer. Although we agree with the State that the issue was placed before the Appellate Division too casually for us to conclude that that court did in fact rely on the proposition, this factor at least raises a question as to whether the state courts have not already passed on the significance of the new evidence.

futile to send an action back to the state courts. Here, the likelihood of a different outcome is simply too speculative to justify the duplication of effort and the frustration to the parties which a remand to the state court would entail.

Prejudice

The State contends that, far from being prejudiced by joint representation, petitioners were assured "a unified defense and thereby avoided incriminating each other." (Objections to the Magistrate's Report, p. 20) However, as the Magistrate pointed out, on the facts of this case a unified defense was no defense at all. It is undisputed that all three defendants were at the scene of the crime and that the only other people present were relatives of the deceased who had come to his rescue. In the face of this overwhelming evidence that one of the three defendants was responsible for the murder, to argue, as defense counsel did at trial, that all three men were innocent was indeed a hollow defense which inevitably redounded to the disadvantage of at least two, if not all three, defendants. See the Magistrate's Report, p. 23.

However, while the evidence rendered a unified defense extremely implausible, it left open the possibility that one or more of the defendants could successfully dissociate himself from the murder itself. The dead man was stabbed only once. Moreover, the testimony at trial varied as to the involvement of each defendant in the fight and as to which defendant—or defendants—was seen straddling Travieso with a knife. (Tr. 100, 106-07, 115-6, 143, 161) Although the State argues that "possible differing degrees of participation were without legal significance" (Objections, p. 20), this argument ignores the burden on the prose-

cution of establishing that all three defendants possessed the requisite intent to aid in the commission of a murder and that, by dissociating himself from the killing, or by shifting the blame onto another, a defendant might have convinced the jury that he lacked such intent. Clearly, such a tactic was impossible so long as all three defendants were represented by the same attorney.[2]

Finally, we agree with the Magistrate's conclusion that the prejudice from joint representation extended to the plea bargaining stage.[3] Although petitioners were offered an "all or nothing" plea package by the prosecution, there is a significant likelihood that here, where the State lacked conclusive evidence as to which of the three defendants actually committed the stabbing, an independent lawyer might have worked out a special "deal" for his client in exchange for an agreement to testify. See *Holloway* v. *Arkansas, supra,* 435 U.S. at 490.

The Magistrate's Report is affirmed and incorporated in this decision. The petitions of Fernando Bermudez, Jose Laureano and Jose Bonilla are granted, and their convictions will be set aside unless they are granted a new trial within ninety days.

It is so ordered.

MORRIS E. LASKER
U.S.D.J.

Dated: New York, New York
June 27, 1979

2. The State also contends that, in light of the new evidence concerning the trial judge's investigation into the possibility of a conflict of interest, the burden is on petitioners to establish actual prejudice rather than on the prosecution, as the Magistrate found, to prove an absence of prejudice. Since we agree with the Magistrate that petitioners have in any event established that prejudice did exist, it is unnecessary to decide this question.

3. This contention is raised only by Fernando Bermudez.

Supreme Court, U.S.
FILED
MAR 26 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1243

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

-against-

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT BERMUDEZ IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

DAVID R. HARRIS,
Superintendent of Greenhaven Correctional
Facility, et al.,

Petitioners,

-against-

FERNANDO BERMUDEZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT BERMUDEZ IN OPPOSITION

The respondent Fernando Bermudez respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Second Circuit's Order of Affirmance in this case.

STATEMENT OF THE CASE

Respondents were indicted by a Grand Jury sitting in Bronx County, State of New York, for intentional murder and other related crimes in February, 1972. Subsequent to their arrest all three respondents retained the services of

the law firm of Siegel, Graber and Bourgeois, Esqs., and this firm continued to represent the respondents through their trial and convictions for intentional murder until sentence was passed in March, 1974.

The prosecution, prior to trial and during the trial itself, did not know which of the three respondents had struck the fatal blow. The deceased's body bore only a single stab wound, the fatal one, and no other marks appeared upon it, save for some minor bruises. The prosecutor offered a "plea package" to the respondents which would have allowed two of them to plead guilty to a reduced charge and be sentenced to a year in prison. The third respondent, presumably the actual killer, would also have pleaded guilty to a reduced charge, but would have received a longer prison sentence, one requiring him to serve a minimum of four to twelve years in prison. The prosecutor left it up to the individual respondent and their lawyer to decide which sentence each one would receive if he pleaded guilty, but insisted that all of the respondents either plead guilty or all of them go to trial.

The respondents appeared before the Trial Court ten times prior to trial. Mr. Stanley Siegel, Esq., who actually represented the respondents on trial, appeared in Court only once prior to trial, on January 21, 1974. The transcript of that single court appearance is less than a page and a half in length and contains no mention of or reference to any conversation between the court and the respondents on any subject. The transcript of January 21, 1974 reveals two off-the-record conversations at the bench. One involves the Court, defense counsel, and the prosecutor. The second off-the-record bench conference involved only the Court and defense counsel. The respondents, according to the transcript, were not present at either bench conference.

The State called eight witnesses at the trial. Six of them, friends or relatives of the deceased, were eye-

witnesses to the fatal affray. They could not agree as to which respondent was fighting with the deceased at any given period, nor did any of them see the fatal, single stab wound inflicted upon the deceased. Respondent Jose Bonilla was the only one of the respondents to testify, and he admitted fighting with the deceased. Respondent Bonilla denied having a knife and stated that the two other respondents did not have knives either and did not fight with the deceased. Defense counsel, in summation, argued to the jury that none of the respondents had stabbed the accused, but that in the confusion "It would have been any member of Travieso's family" who killed him. This argument was labeled "ludicrous" by the State, and the jury agreed, convicting all three respondents of intentional murder. On March 12, 1974, the respondents were sentenced and received terms of imprisonment with a minimum sentence of fifteen years to life for the murder conviction. Respondent Bermudez appealed his conviction to the Supreme Court of the State of New York, Appellate Division, First Department. He argued that the failure of the Trial Court to inquire into the possibility of a conflict deprived him of his constitutional right to the effective assistance of counsel. The State, in response, argued that Bermudez had not been prejudiced by the joint representation. The judgment of conviction was affirmed. Leave to appeal to the New York Court of Appeals was denied by then Chief Judge Breitel on January 22, 1975.

The respondent Jose Bonilla had his appeal heard by the supreme Court of the State of New York. Appellate Division, First Department, after the respondent Fernando Bermudez had petitioned in the United States District Court for the Southern District of New York for a writ of habeas corpus. Respondent Bonilla argued to the panel hearing his appeal in the State Court that his trial counsel had raised the question of a possible conflict of interest between the respondents with the Trial Court, and

presented the Judges of the Appellate Division, First Department, with copies of the affidavit of his trial counsel, which were part of respondent Bermudez's petition for a writ of habeas corpus. Trial counsel stated in his affidavit that he had informed the Trial Court, prior to trial, that a conflict existed between his clients and requested the appointment of separate counsel for each of the respondents. Counsel further stated that the Trial Court had dismissed his request as being a "stalling tactic." Counsel for the State, appearing before the Appellate Division, First Department, conceded in that Court that the Trial Judge had not inquired into the possibility of a conflict between the respondents, but argued that the respondents had not suffered any prejudice. Respondent Bonilla's conviction was affirmed by the Appellate Division, First Department. Leave to appeal to the New York Court of Appeals was denied by then Chief Judge Breitel.

Defense counsel's affidavit was part of the petition for a writ of habeas corpus that the respondent Bermudez submitted to the United States District Court for the Southern District of New York. In response to that affidavit the State submitted an affidavit from the Trial Judge, the Honorable William Kapelman, J.S.C., in which he stated that he had asked defense counsel whether a potential conflict of interest might exist between the respondents. Upon receiving assurances from counsel that no conflict existed or was likely to arise, the Trial Court directed counsel to advise his clients of the Court's concern and to ask the respondents if they wanted separate counsel. Counsel reported back to the Court, stating he had spoken to his clients and they were satisfied with counsel. These two affidavits, the one from defense counsel and the other from Mr. Justice William Kapelman were, along with numerous other transcripts, affidavits, etc., submitted by the District Court to United States Magistrate Nina Gershon for her report and recommendation. Magistrate Gershon in her report found that the Trial Court had never addressed himself to the respondents, either in a group or jointly, about their joint representation.

After the issuance of Magistrate Gershon's report, in which she found that the respondents had been prejudiced by the joint representation at their trial, petitioner's counsel submitted a second affidavit from Mr. Justice Kapelman in which he stated, for the first time, that "he believed" he had questioned the respondents personally and they had agreed to the joint representation.

The District Court adopted the finding of the Magistrate, holding that the respondents had exhausted their State remedies and further holding that the respondents had been prejudiced by the joint representation and ordering their petitions be granted and the convictions set aside unless they were granted a new trial within ninety days.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, arguing that the respondents had not exhausted their State remedies, and that the respondents had not been prejudiced by the joint representation at their trial. On November 26, 1979 the Court of Appeals summarily affirmed the granting of the writ on the opinion of the District Court.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the question presented in the petition.

The sole question presented in the petition is whether "three defendants who have jointly retained one attorney to represent them in a criminal trial can consent to such joint representation in response to an inquiry by the Trial Judge, thereby waiving their right to subsequently challenge the joint representation as ineffective under the

Sixth and Fourteenth Amendments to the United States Constitution."

The Second Circuit, however, did not decide that question in this proceeding. Moreover, neither the Court of Appeals nor the District Court was ever asked by petitioner to decide that question.

The Second Circuit in affirming the Order of the District Court granting the writs and ordering the respondents re-tried within ninety days rejected the petitioner's claim that the respondents failed to exhaust their State remedies, a claim which the petitioner had abadoned in this Court. The Court also rejected petitioner's claim that respondents had not been prejudiced by their joint representation at trial. The question raised here by the petitioner was never put to the Court below, and thus it was never decided by them.

The record below does not have the factual predicate to allow this Court to decide the single question presented. The only evidence put forth by the petitioner is an affidavit by the Trial Court that he "believes" he had questioned the respondents personally and that they had agreed to the joint representation.

The statements in the second Kapelman affidavit are controverted by the Court record, which shows no such conversation between the Court and the respondents. Thus, the second Kapelman affidavit is conclusively refuted by the Court transcript of the proceedings of January 21, 1974 and moreover, it consists of such generalities that will not entitle the petitioner to any relief because the statements concerning the Trial Judge's belief, unsupported by any other admissible evidence, would not be sufficient to give the petitioner the relief he seeks. *Dalli v. United States,* 491 F.2d 758, 760 (2nd Cir. 1974).

The record in this case is devoid of any indication that the petitioner at any time raised the question that he raises here. In the lower court and again in the Court of Appeals,

petitioner's argument was limited to which party had the burden of proof in proving the existence of prejudice from the joint representation, and only raised the question of the Judge's having inquired of the respondents concerning the joint representation to determine which party had the burden of proof to show the prejudice, or lack of it, arising from the joint representation. The question raised here was not part of the proceedings in the State Courts, the District Court or the Court of Appeals.

2. Absent a ruling by the Second Circuit as to the question raised by this petitioner, no reason exists for the grant of certiorari.

The Second Circuit did not decide, as is clear, the question now raised by petitioner. The case was decided on different grounds below than those being urged here for the first time. Thus, if this case were considered by this Court it would be decided on other grounds than those urged by petitioner, and thus no reason for granting certiorari exists.

This is a unique case and it is based on a record that precludes review of the question now being raised. Its uniqueness precludes review by this Court.

Moreover, the question which petitioner belatedly seeks to raise before this Court has already been answered in the Courts of the State of New York by the decision of the New York State Court of Appeals in *People v. Macerola,* 47 N.Y.2d 257 (1979), where the Court held that a Trial Judge must inquire of the defendants in a multi-defendant trial where they are represented by a single attorney, whether they understand the possible conflicts that could arise from such joint representation, and also inquire as to their own background, age, length of schooling, etc., to see if they understand what a conflict is and how it could arise. The New York Court of Appeals also mandated that such discussion between the Court and the defendants be on the record.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1243

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WARDEN, Greenhaven Correctional Facility, SUPERINTENDENT, Auburn Correctional Facility, SUPERINTENDENT, Greenhaven Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Brief for Respondent in Opposition

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

WARDEN, Greenhaven Correctional Facility, SUPERINTENDENT, Auburn Correctional Facility, SUPERINTENDENT, Greenhaven Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

Brief for Respondent in Opposition

Respondent Jose Laureano respectfully submits that there are no special or important reasons to review on writ of certiorari the order of the United States Court of Appeals for the Second Circuit, which affirmed the decision of the United States District Court for the Southern District granting respondent's petition for a writ of habeas corpus. The order of the Court of Appeals is based upon a finding that the facts appearing on the state court record supported respondent's claim that he was prejudiced by the joint representation of him and his co-defendants by one attorney. The case presents no holding in conflict with a decision of any other Court of Appeals, nor with any decision of this Court. Rule 19(1)(a) of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The order of the Second Circuit Court of Appeals, reproduced in petitioner's appendix at pages 1a-2a, affirmed the order of the District Court on the opinion of the Hon. Morris E. Lasker, reproduced in petitioner's appendix at pages 3a-9a. Judge Lasker's opinion in turn incorporated and affirmed the Magistrate's Report, reproduced in the appendix to the brief of respondent Jose Bonilla, at pages 1a-35a.

QUESTION PRESENTED

Whether the Court of Appeals correctly granted the petition for writ of habeas corpus on the ground that respondent has shown that he was prejudiced by the joint representation of him and his co-defendants by one attorney at his criminal trial.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to effective assistance of counsel in the Sixth Amendment to the United States Constitution, set forth at pages 2 and 3 of the petition, and the right to due process of law in the Fourteenth Amendment to the United States Constitution, set forth at page 3 of the petition.

STATEMENT OF THE CASE

Respondent respectfully submits that the question presented in the petition is out of the context of the Court of Appeals' order, which is strongly grounded in the facts as they occurred during the state court trial. Because these facts are essential to an understanding of the opinions below, the evidence at trial is outlined first, followed by a discussion of the prior proceedings in the state and federal courts.

The Evidence at Trial

On the night of January 28, 1972, three friends, Jose Bonilla, Fernando Bermudez and Jose Laureano, were walking along the sidewalk on Simpson Street in the Bronx. William Travieso, who lived nearby, was walking in the opposite direction, and jostled Bonilla as he passed the three friends. Words were exchanged and a fist fight erupted.

Travieso's friends and family came out into the street to intervene in the fighting. Travieso was knocked to the ground and someone was on top of him. At least one person had a knife and Travieso was stabbed. He died of a single stab wound.

Respondent Jose Laureano was tried and convicted in New York Supreme Court for Bronx County with his two co-defendants, Bermudez and Bonilla, in March, 1974. Each of the respondents was charged with intentional murder and possession of a weapon. All three were represented by one retained attorney, Stanley Siegel.

The prosecution witnesses consisted primarily of the family and friends of Travieso who intervened in the fight. Different witnesses saw different things, and the sequence of events was confused, at best.

Despite the confusion, the major movements in the fight are described similarly by the prosecution witnesses. The basic difference among the testimony of the prosecution witnesses is that the Travieso's seem to ascribe to Bermudez the same actions that are ascribed to Bonilla by the Torres'.

None of the witnesses placed Laureano in a position where he could possibly have been the person who stabbed William Travieso. Several witnesses placed Laureano on the sidewalk, behaving like a spectator at a boxing match.

The prosecution's theory was that each defendant was guilty of "acting in concert" to kill Travieso, and no attempt was made to establish which person had inflicted the stab wound.

The Appeals

Laureano appealed from the judgment of conviction claiming that he had been denied effective assistance of counsel as a result of the joint representation of all three defendants. His conviction was affirmed by the Appellate Division of the New York Supreme Court, First Department, 46 A.D.2d 1014 (1974), and leave to appeal to the Court of Appeals was denied on January 22, 1975.

The Magistrate and the District Court

Laureano presented the same claim to the United States District Court for the Southern District of New York in his petition for a writ of habeas corpus filed in February, 1978. The petition was consolidated with that of respondent Bermudez and referred to a Magistrate.

The District Court and the Magistrate found that the prejudice to respondent Laureano resulting from the joint representation of counsel was apparent on the face of the state court record. Opinion of the District Court, petitioner's appendix, at pages 8a-9a; Magistrate's Report, respondent Bonilla's appendix, at pages 22a-25a, 28a-32a.

Specifically, the District Court ruled that the unified defense presented by defense counsel that none of the three respondents had stabbed the victim was "implausible" and "amounted to no defense at all" on the facts of this case. Opinion of the District Court, petitioner's appendix, at page 8a. Since the victim had been stabbed

only once, the prosecution's evidence varied as to the participation of each of the respondents, and because the prosecution was required to prove that each respondent intended to commit murder, the only viable defense for each defendant was to dissociate himself from the murder. Ibid.

The threshold question before the Magistrate and the District Court was to allocate the burden of proving prejudice resulting from the joint representation. Decisions of the Second Circuit Court of Appeals made the existence and adequacy of a pre-trial inquiry by the trial judge relevant to the allocation of this burden of proof.[1] The state court record contained no indication that any inquiry had been made by the trial court. During the habeas proceedings, however, affidavits were submitted by the state trial judge and by defense counsel Siegel, containing contradictory allegations as to whether an inquiry had been made.

The trial judge's first affidavit, sworn in May, 1977, stated that it was he who had raised the issue with defense counsel at an off-the-record conference, and that Siegel had assured the judge that no conflict of interest existed among the defenses of the three co-defendants. It was this first affidavit that was the basis for the Magistrate's ruling that the alleged inquiry was insufficient to establish consent by respondents to the joint representation of counsel. Magistrate's Report, respondent Bonilla's appendix, at page 13a.

After the issuance of the Magistrate's report, the trial judge submitted a second affidavit, sworn in April, 1979. In this second affidavit, the trial judge remembers that defense counsel had given his assurance that no conflict of interest existed in open court, in the presence of all three respondents. The judge further stated in his second

[1] See discussion in Reasons for Denying the Writ, at page 7, infra.

affidavit that he "believe[d]" he questioned the three respondents directly and that they all agreed to the joint representation.

The District Court considered the second affidavit of the trial judge, noting that it was filed "[s]omewhat surprisingly" after the issuance of the Magistrate's Report. Opinion of the District Court, petitioner's appendix, at page 6-a. This second affidavit did not convince the District Court to modify the Magistrate's conclusion.

This Court's decision in Holloway v. Arkansas, 435 U.S. 478 (1978), rendered defense counsel Siegel's affidavit relevant to the extent that it might describe the kind of timely motion for separate counsel that would invoke a presumption of prejudice. Siegel's recollection contained in his affidavit was that he had raised the possibility of a conflict of interest with the trial judge in an off-the-record conference before the trial, and that the trial judge had responded by ordering Siegel to proceed with the trial.

The District Court found that this affidavit of defense counsel probably was not sufficient to bring the case within the ruling of Holloway v. Arkansas, supra. Opinion of the District Court, petitioner's appendix, at page 7a.

Since the District Court and the Magistrate held that prejudice had been proven regardless of which party bore the burden of proof on that issue, the allegations in the affidavits were found not to be significant to the disposition of the case. Opinion of the District Court, petitioner's appendix, at page 6a; Magistrate's Report, respondent Bonilla's appendix, at page 13a.

The Court of Appeals' Order

The questions presented to the Court of Appeals by the State were whether state remedies had been exhausted and, whether the respondents had been prejudiced by the joint representation of counsel. The Court of Appeals affirmed the granting of the petitions for writ of habeas corpus on the opinion of the District Court.

REASONS FOR DENYING THE WRIT

The State grounds its application for a writ of certiorari on the notion that the order of the Court of Appeals constitutes a ruling that respondents could not consent o the joint representation of counsel. In framing the question in this way, the State relies upon the inquiry allegedly made by the trial court into the possibility of a conflict of interest and the alleged acquiescence by respondents to joint representation by one attorney.

Yet the alleged consent of respondents to joint representation as described by respondents is relevant only to the allocation of the burden of proving prejudice in the habeas proceedings. Colon v. Fogg, 603 F.2d 403 (1979); Salomon v. LaVallee, 575 F.2d 1051 (1978); Kaplan v. Bombard 573 F.2d 708 (1978). Since the courts below found that prejudice to respondents was apparent, regardless of which party bore the burden of proof, the trial court's alleged inquiry and the alleged consent by respondents was not material to the issue before the Court of Appeals.

If the State means to raise in this Court, for the first time, the proposition that respondents' alleged acquiescence to the joint representation of counsel was a waiver of their Sixth Amendment right to effective assistance of

counsel, the answer is clear. The alleged inquiry made by the trial court is not sufficient to demonstrate a knowing and intelligent waiver by respondents of a constitutional right. Johnson v. Zerbst, 304 U.S. 458 (1938).

There has never been any issue presented in this case as to whether respondents could have consented to the joint representation of counsel. Of course, they could have consented, and assuming the contents of the trial judge's second affidavit to be true, may have consented. However, the allegation that they gave their uneducated acquiescence to joint representation of counsel is obviously insufficient to meet the State's burden on the affirmative defense of waiver.

The unique facts of this case were considered by the Court of Appeals and determined by application of well-established principles. No novel issue was presented to or decided by the Court of Appeals. Certainly, the courts below were not presented with any claim of waiver of a constitutional right, nor would the facts of this case support any such claim.

The State also asserts that the Court of Appeals' order is in conflict with this Court's decision in Holloway v. Arkansas, 435 U.S. 475 (1978) without indicating where the conflict may lie. The District Court noted in its opinion that the allegations in defense counsel Siegel's affidavit would not, even if true, be sufficient to invoke the presumption of prejudice provided for in Holloway where a timely motion for separate counsel is denied.

The finding of the District Court, which was affirmed by the order of the Court of Appeals, was that prejudice to respondent is apparent from the record. Thus, the Holloway decision is inapplicable to, but not inconsistent with the order of the Court of Appeals.

The questions presented to the Court of Appeals by the State were whether state remedies had been exhausted as required by 28 U.S.C. §2254 and whether the respondents had been prejudiced by the joint representation. The Court of Appeals answered both of those questions in the affirmative. Those rulings are entirely consistent with the decisions of other Courts of Appeal on the same issue and specifically with the decisions in the cases listed on page 7 of the petition.

Respondent Jose Laureano respectfully submits that this case is not appropriate for review on writ of certiorari.

CONCLUSION

FOR ALL OF THE REASONS STATED ABOVE, THE WRIT SHOULD BE DENIED.

Dated: New York, New York
February 27, 1980

Amanda Potterfield

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No._____

WARDEN, Greenhaven Correctional Facility, SUPERINTENDENT, Auburn Correctional Facility, SUPERintendent, Greenhaven Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AFFIDAVIT OF SERVICE

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

Linda Barnes, being duly sworn, deposes and says:

That deponent is not a party to the action and is over 18 years of age and resides at 20 Vesey Street, New York, New York.

That on February 28, 1980, deponent served the within Motion for Leave to Proceed In Forma Pauperis with Supporting Affidavit and Brief for Respondents In Opposition, upon Charles Bach, Jr., Assistant District Attorney, Bronx County, 215 East 161st Street, Bronx New York 10451, Gilbert Epstein, Esq., Attorney for Respondent Bermudez, 17 John Street, New York, New York 10038; Diana Budzanoski, Legal Aid Society, 15 Park Row, New York 10038, Attorney for respondent Bonilla, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in--a post office-- official depository under the exclusive care and custody of the United States Postal Services within the State of New York

Linda Barnes

Linda Barnes

Sworn to before me this 28th day

of February, 1980.

NOTARY PUBLIC

MARJORIE A. ROSEN
Notary Public, State of New York
No. 31-4654195
Qualified in New York County
Commission Expires March 30, 19...

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-1243

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

-against-

FERNANDO BERMUDEZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BONILLA IN OPPOSITION

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Attorneys for Respondent Bonilla

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-1243

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

FERNANDO BERMUDEZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BONILLA IN OPPOSITION

OPINIONS BELOW

The order of the Court of Appeals and the opinion of the District Court for the Southern District of New York appear in the Appendix to the Petition. The Magistrate's report is appended to this brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals correctly decided Respondent Bonilla had not waived his right to separate counsel and that defense counsel's obligations to the jointly represented respondents compelled counsel to subordinate Bonilla's interests to the collective interests of the group and prevented counsel from shaping Bonilla's defense according to the evidence at trial thereby denying him the effective assistance of counsel under the Sixth and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments VI and XIV. The text appears in the Petition at 2-3.

STATEMENT OF THE CASE

The respondents were indicted, inter alia, for intentional murder. N.Y. Penal Law §125.25(1) (McKinney 1975). In January 1974 they went to trial before the Honorable William Kapelman, J.S.C., and a jury, represented by a retained attorney, Stanley L. Siegel, Esq.

The prosecution witnesses, the family and friends of the deceased, established that the deceased engaged in a fight with the respondents. Medical evidence showed that the deceased received a single fatal stab wound, a bruise, and an abraded lip during the fight. None of the witnesses saw the stabbing occur, and no clear picture of the sequence of events or of the role of each respondent emerged. The prosecutor conceded that he could not prove who inflicted the fatal wound and asked for a guilty verdict if the jury were convinced that the respondents acted as accomplices to cause the death of the victim (T. 90, 101, 197, 162, 201, 220, 229, 263A-265; RA. 3-5).*

Respondent Bonilla, the only defense witness, identified the victim as the initial aggressor. Bonilla denied being armed with a knife, and did not believe his friends were either (T. 302-04, 366-69, 371-72). The jury convicted the three of intentional murder. On March 12, 1974, Bonilla received the minimum sentence of 15 years to life on the murder conviction.

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*Numbers prefaced by "T" refer to the trial transcript; by "RA " to the Appendix to Respondent Bonilla's brief; and numbers followed by "a" refer to the Appendix to the Petition.

Bonilla appealed his conviction to the Supreme Court of the State of New York, Appellate Division, First Department. He argued, inter alia, that he had been denied the effective assistance of counsel, because his individual interests were subordinated to the collective interests of the group, and because counsel was unable to shape Bonilla's defense according to the evidence at trial. He also contended that he had not waived his right to separate counsel. The District Attorney did not dispute this contention and responded only that Bonilla was not prejudiced by the joint representation. The judgment of conviction was affirmed by the Appellate Division on February 15, 1977. Leave to appeal to the New York Court of Appeals was denied by then Chief Judge Breitel on April 14, 1977.

Subsequently, Bonilla petitioned for a writ of habeas corpus in the Federal District Court for the Southern District of New York, as had his codefendants. Respondent Bermudez's petition included the affidavit of defense counsel alleging that before trial in an off-the-record conference counsel had informed the judge that a conflict existed and had requested that his clients have separate counsel, and that the judge replied that this was a "stalling tactic." In response the prosecutor affirmed that it was the judge who raised the question. The judge affirmed that he had raised the issue during a conference in chambers and had instructed counsel to discuss the matter with respondents. Subsequently, counsel assured him that respondents were satisfied with joint representation.

The petitions of Bermudez and Laureano were referred to a Magistrate. The Magistrate issued a report recommending that the writ be granted in which she specifically concluded that the allegations of the trial judge, if accepted, did not make out consent to the joint representation (RA. 15-17).

After the issuance of the report the trial judge submitted a second affidavit in which he alleged that he had inquired of counsel in the presence of respondents whether they had been advised of the risks of joint representation, and further, that he "believed" that he had asked respondents personally whether they wished to proceed jointly represented.

The District Court adopted the findings of the Magistrate, and deemed them applicable to Bonilla. Alluding to both affidavits of the trial judge in the course of deciding that respondents had exhausted their state remedies (an issue petitioners have abandoned in this Court) (6a-7a), the District Court concurred with the Magistrate that respondents were prejudiced by the joint representation and granted the writs.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, raising the same issues of lack of prejudice and failure to exhaust state remedies they had in the District Court. On November 26, 1979, that Court summarily affirmed the granting of the writ on the opinion of the District Court (1a-2a).

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY DECIDED RESPONDENT BONILLA HAD NOT WAIVED HIS RIGHT TO SEPARATE COUNSEL AND THAT DEFENSE COUNSEL'S OBLIGATIONS TO THE JOINTLY REPRESENTED RESPONDENTS COMPELLED COUNSEL TO SUBORDINATE RESPONDENT BONILLA'S INTERESTS TO THE COLLECTIVE INTERESTS OF THE GROUP AND PREVENTED COUNSEL FROM SHAPING RESPONDENT BONILLA'S DEFENSE ACCORDING TO THE EVIDENCE AT TRIAL THEREBY DENYING HIM THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

This Court should deny the petition, for the issue as posed by petitioners is not presented on this record. In the state court petitioners argued only that Bonilla had not suffered from the joint representation and did not dispute Bonilla's claim that he had not waived his right to separate

counsel (see 7a, n. 1).* As this case has progressed through the courts, petitioners have transmuted their claim into an argument that Bonilla consented to the joint representation and thereby waived the right to claim ineffective assistance because of it, apparently abandoning the argument that Bonilla was not prejudiced by the joint representation. This record does not establish, and no court has found, that Bonilla consented to the joint representation and waived his right to redress for ineffective assistance of counsel arising from it.

Petitioners misconstrue the decisions of the courts below when they claim that the District Court and the Court of Appeals "disregarded" the trial judge's affidavits establishing consent and that these courts "ruled, in effect, that Bonilla could not consent to joint representation prior to trial" (Petition at 6). Correctly interpreted, these decisions hold that Bonilla did not consent. The Magistrate considered the question of consent at length and examined the allegations supporting a finding of consent, as then put forward by petitioners, in light of Kaplan v. Bombard, 573 F.2d 708 (2d Cir. 1978), a case which considered the constitutional requirements for a finding of voluntary and knowing consent to joint representation and which found that the defendant Kaplan had consented. The District Court adopted the Magistrate's findings. In its decision it explicitly referred to the trial judge's second affidavit submitted after the Magistrate's report (6a-7a, 9a, n. 2). Obviously, the District Court

*On the state appeal the District Attorney had two opportunities to assert that there had been a waiver. Before the appeal was perfected the District Attorney and the office of the trial judge were advised that Bonilla intended to raise the conflict issue. In an effort to determine whether the trial judge had made an inquiry on-the-record as required by People v. Gomberg, 38 N.Y.2d 307 (1975), appellate counsel moved to have the record enlarged. In response to the motion the District Attorney did not assert that a waiver was obtained off-the-record. In their brief on the merits the District Attorney could still have asserted that the record was inadequate on the issue of waiver and asked for a hearing (People v. Rivera, 62 A.D.2d 767 [1st Dept. 1978]), but did not.

determined that the new affidavit did not alter the finding of lack of consent. Similarly, the Court of Appeals by summarily affirming expressed its agreement with this finding. Consequently, the decisions in this case are not in conflict with this Court's prior rulings in Holloway v. Arkansas, 435 U.S. 475 (1978), or Glasser v. United States, 315 U.S. 60 (1942), or the decisions of other circuit courts as cited in the Petition at 7.

Since the courts below made no finding of consent, the question before them was the existence of a real conflict of interest hampering the defense and causing prejudice to respondents. They correctly decided that such a conflict existed.*

As this Court has recognized, jointly represented defendants may suffer because of what their attorney is prevented from doing. Holloway v. Arkansas, supra, 435 U.S. at 489-90. Consequently, a prejudicial conflict exists when an attorney representing several defendants cannot put forward on behalf of one of them a defense based on the evidence at trial, because it would harm the interests of another. Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir., 1975); Austin v. Erickson, 477 F.2d 620, 623-26 (8th Cir. 1973); and Robinson v. Parratt, 421 F. Supp. 664, 670-72 (D. Neb.), aff'd, 546 F.2d 764 (8th Cir. 1976). See Smith v. Regan, 583 F.2d 72, 77 (2d Cir. 1978); and United States v. Bernstein, 533 F.2d 775, 788 (2d Cir.), cert. denied, 429 U.S. 998 (1976). It exists when an attorney cannot cross-examine a witness on

*Cuyler v. Sullivan, 593 F.2d 512 (3d Cir. 1979), cert. granted, 48 U.S.L.W. 3217 (U.S. Oct. 1, 1979) (No. 78-1832), pending before this Court, apparently raises the issue of whether the right to the effective assistance of counsel is breached by the mere possibility, however remote, that a conflict of interest may exist, 48 U.S.L.W. 3014. If that is the correct standard, the Court of Appeals judged Bonilla's claim meritorious by too strict a standard. If it is not and actual prejudice is required, the Court of Appeals applied the appropriate test.

behalf of one client because of his responsibilities to ano-another. Glasser v. United States, supra, 315 U.S. at 72-73. See Kaplan v. Bombard, supra, 573 F.2d at 713; and United States v. Bernstein, supra, 573 F.2d at 788. It also exists when counsel should and does not distinguish the position of one defendant and dissociate him from the others because of counsel's divided loyalties. United States ex rel. Hart v. Davenport, 478 F.2d 203, 208-10 (3d Cir. 1973); and Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965).

Bonilla's defense was disabled in each of these ways. The strength of the prosecution's case lay in the irrefutable testimony placing the three respondents at the scene and establishing that one of them must have fatally wounded the victim. The weaknesses lay in the lack of proof as to which respondent actually inflicted the wound and when it happened; in the confused and contradictory accounts of the event given by the witnesses; and in the need to rely on varying accounts of each respondent's conduct at the scene to establish that he intended to commit murder.

In the factual and legal posture of this case, Bonilla's only viable defense was to convince the jury that his conduct at the scene demonstrated that he had neither killed nor intended to kill the victim and that one of the others must have. However, counsel avoided clarifying the sequence of events and isolating the conduct of any of his clients, because of the severe risk that limiting the participation of one defendant would redound to the disadvantage of another. Defense counsel was forced to adopt a united defense for all three respondents, but as the District Court wrote:

> to argue, as defense counsel did at trial, that all three men were innocent was indeed a hollow defense which inevitably redounded to the disadvantage of at least two, if not all three, de-defendants (8a).

In conclusion, the Court of Appeals decided in Bonilla's favor applying principles consistent with this Court's prior decisions and with the decisions of other circuit courts. The writ should not be granted.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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February, 1980